

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GARY RAYMOND FOX,

Plaintiff,

v.

Civil Action 2:17-cv-880

Judge Algenon L. Marbley

Magistrate Judge Chelsey M. Vascura

MANAGER,

In Town Motel Suites,

Defendant.

REPORT AND RECOMMENDATION

This matter is before the United States Magistrate Judge for a Report and Recommendation on the Court's October 11, 2017 Order directing Plaintiff to pay the filing fee or submit a completed *in forma pauperis* affidavit. (ECF No. 2.) For the reasons that follow, it is **RECOMMENDED** that Plaintiff's action be **DISMISSED WITH PREJUDICE** pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute.

I.

Plaintiff filed this action on October 10, 2017. (ECF No. 1.) Plaintiff had neither paid the filing fee nor submitted the required materials in support of his application to proceed *in forma pauperis* and was therefore ordered to either pay the fee or submit a completed affidavit within thirty days. (October 11, 2017 R&R, ECF No. 2.) That Order further advised Plaintiff that that failure to timely comply with the Order could result in dismissal of this action for failure to prosecute." (*Id.*) Plaintiff failed to do so. On November 11, 2017, the undersigned issued a Report and Recommendation, recommending that Plaintiff's action be dismissed with prejudice

pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. (ECF No. 4.) That Report and Recommendation was adopted on December 13, 2017. (ECF NO. 5.) Subsequently, upon receipt of mail returned to the Court as undeliverable, the Court became discovered that Plaintiff's address had been entered incorrectly on the docket. (ECF Nos. 7 & 8.) Consequently, the Court vacated its previous Order adopting the Report and Recommendation to allow Plaintiff time to respond to the undersigned's first Order and Deficiency Notice. (ECF No. 2.)

To date, Plaintiff has failed to pay the filing fee or submit a completed affidavit.

II.

Under the circumstances presented in the instant case, the undersigned recommends dismissal of Plaintiff's action pursuant to Rule 41(b). The Court's inherent authority to dismiss a plaintiff's action with prejudice because of his failure to prosecute is expressly recognized in Rule 41(b), which provides in pertinent part: "If the plaintiff fails to prosecute or comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits." Fed. R. Civ. P. 41(b); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629–31 (1962). "This measure is available to the district court as a tool to effect management of its docket and avoidance of unnecessary burdens on the tax-supported courts and opposing parties." *Knoll v. AT & T*, 176 F.3d 359, 363 (6th Cir. 1999).

The Sixth Circuit directs the district courts to consider the following four factors in deciding whether to dismiss an action for failure to prosecute under Rule 41(b):

- (1) whether the party's failure is due to willfulness, bad faith, or fault;
- (2) whether the adversary was prejudiced by the dismissed party's conduct;
- (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and
- (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Schafer v. City of Defiance Police Dept., 529 F.3d 731, 737 (6th Cir. 2008) (citing *Knoll*, 176 F.3d at 363). “Although typically none of the factors is outcome dispositive, . . . a case is properly dismissed by the district court where there is a clear record of delay or contumacious conduct.” *Schafer*, 529 F.3d at 737 (quoting *Knoll*, 176 F.3d at 363).

III.

Here, Plaintiff has not complied with the Court’s express order that he pay the \$400 filing fee or submit a completed affidavit if he wished to proceed, even after being granted an extension until January 29, 2018 to do so. (Dec. 29, 2017 Order, ECF No. 9.) Moreover, the Court explicitly cautioned Plaintiff numerous times that failure to comply would result in dismissal of this action for failure to prosecute pursuant to Rule 41(b). *See Stough v. Mayville Cmty. Schs.*, 138 F.3d 612, 615 (6th Cir. 1998) (noting that “[p]rior notice, or lack thereof, is . . . a key consideration” in whether dismissal under rule 41(b) is appropriate). Plaintiff’s failure to timely comply with the clear Orders of the Court, which established reasonable deadlines for compliance, constitutes bad faith or contumacious conduct. *See Steward v. Cty. of Jackson, Tenn.*, 8 F. App’x 294, 296 (6th Cir. 2001) (concluding that a plaintiff’s failure to comply with a court’s order “constitute[d] bad faith or contumacious conduct and justify[d] dismissal”). Because Plaintiff has missed deadlines and disregarded Court orders, the Undersigned concludes that no alternative sanction would protect the integrity of the pretrial process.

It is therefore **RECOMMENDED** that the Court **DISMISS THIS ACTION WITH PREJUDICE** under Rule 41(b).

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE